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No. 08-306

IN THE

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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I. THE VIRGINIA SUPREME COURT'S LAW OF THE CASE DETERMINATION DOES NOT DEPRIVE THIS COURT OF JURISDICTION TO REACH IMPORTANT FEDERAL ISSUES BECAUSE THE DECISION DOES NOT REST ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND.

The Virginia Supreme Court failed to reach the merits of the substantial federal issues in this case by expanding, for the first time in Virginia's history, the law of the *case* doctrine to become the law of the *cases* doctrine. As acknowledged in the opinion below (App. 7a-10a), for nearly a century, Virginia's law of the case doctrine provided that, "'[w]here there have been two appeals in the *same* case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal.'" *Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684 (Va. 1917) (emphasis added). Neither Respondent nor the court cited a single case where the doctrine had been applied to preclude a subsequent appeal on a *different* issue in a *different* case between the same parties. Yet, that is exactly what the Virginia Supreme Court did here. Respondent argues that Virginia's newly-minted law of the *cases* doctrine constitutes an independent and adequate state law ground to preclude this Court from reaching the substantial federal questions presented.

A brief description of the two cases reveals the differences. In the first case, on July 1, 2004, *Petitioner commenced* an action in the Virginia circuit court seeking a declaration that, pursuant to Virginia's artificial insemination statute, Petitioner was the sole

biological parent to her daughter, Isabella (the "Parentage Case"). Respondent moved to dismiss, arguing that the Parental Kidnapping Prevention Act ("PKPA") deprived Virginia of subject matter jurisdiction because Vermont had issued a temporary visitation order two weeks before the Virginia Petition was filed. The circuit court rejected that argument and issued an order declaring Petitioner Isabella's sole biological parent. On November 28, 2006, the Virginia Court of Appeals reversed, concluding that the PKPA deprived Virginia of jurisdiction to issue the parentage determination. That decision became final.[1]

In the second Virginia case, in March 2005, *Respondent commenced* a proceeding to register in Virginia the Vermont visitation determination (the "Registration Case"). Although the Juvenile and Domestic Relations court registered the Vermont order, the circuit court reversed, concluding that Virginia's law precluded granting full faith and credit to the Vermont order. In particular, Virginia's Marriage Affirmation Act ("MAA") provides that

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. *Any such civil union*, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction *shall*

1. See Petition at 6-7 & n.4 for an explanation of why the Virginia Supreme Court dismissed the Petition for Appeal.

> *be void in all respects* in Virginia and any contractual rights created thereby *shall be void and unenforceable.*

Va. Code § 20-45.3 (emphasis added). On April 17, 2007, the Virginia Court of Appeals summarily vacated the circuit court decision in the Registration Case, expressly relying on its November 2006 decision in the Parentage Case. (App. 16a) ("In light of our decision in Record No. 2654-04-4, it is clear that the trial court likewise erred in this case.").

Significantly, after the November 2006 Court of Appeals' decision in the Parentage Case, Virginia's Marriage Amendment became effective. It provides, in relevant part, that

> only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and . . . . This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.

Va. Const. art. I, § 15-A. Nevertheless, the Court of Appeals relied entirely on its November 2006 opinion in the Parentage Case even though that opinion (i) did not consider the effect of the constitutional Amendment on the issue and (ii) expressly stated that it "need not, and did not, decide whether the MAA applies to this case." (App. 45a). The Virginia Supreme Court, in the opinion below, refused to reach the merits in the Registration

Case, concluding instead that the issues decided in the separate Parentage Case somehow were law of the case as to *different* issues raised in the Registration Case.

The Virginia Supreme Court attempted to minimize its drastic departure from the century-old law of the case doctrine by broadly stating: "The two Virginia appeals were part of the 'same litigation' seeking to resolve the single question [of] which custody order, the Vermont custody order or the circuit court's order, would govern the parties' custody and visitation dispute." (App. 12a). In so doing, the court ignored Petitioner's arguments, based on the different legal issues addressed in the Parentage and Registration Cases, that the two cases were indeed separate cases involving separate issues. In particular, in the Parentage Case, the Court of Appeals explained that "[t]he issue before us is the narrow one of jurisdiction." (App. 46a). That court expressly stated that it did "not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. We do not comment on the constitutionality, viability or breadth of the UCCJEA and the MAA." (App. 46a.). Yet, in the Registration Case, those were the precise questions raised.

While the legal question in the Parentage Case was whether Virginia had jurisdiction under the PKPA to enter a parentage order *after* Vermont had issued a temporary visitation order, the question in the Registration Case was whether Virginia had to give full faith and credit to a foreign custody order in light of Virginia's laws declaring any such order void and unenforceable. The circuit court recognized the pivotal

issue in the Registration Case when it expressly held: "The Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia." (App. 20a). Thus, although the two cases are related, involving the same parties, *they involve different legal issues.* When the Virginia Supreme Court held that the decision in the Parentage Case on the jurisdiction issue was law of the case as to the issue of full faith and credit in the Registration Case, it created a newly-minted law of the *cases* doctrine that, by definition, has not been "'strictly or regularly followed'" by that court. As a result, the opinion below does not rest on an independent and adequate state law ground. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (explaining that "a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed'"); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) ("[n]ovelty in procedural requirements cannot be permitted to thwart review"); *cf. Lee v. Kamna*, 534 U.S. 362, 382 (2002) (adequacy determination is a federal question).

Recognizing the weakness of her position, Respondent asserts that Petitioner is merely "quibbl[ing] about the label attached to the court's law of the case determination." (Brief in Opposition at 17). She argues that "had the Virginia Supreme Court viewed the two cases as not part of the same litigation, it could have held Lisa's claims in the second appeal barred by res judicata." (*Id.*). Not only is that point irrelevant to the question whether the court's law of the case determination constitutes an independent and adequate state law ground, but (i) Respondent fails to mention that the court could not have ruled on that

basis because Respondent did not affirmatively plead that defense (*see Davis v. Marshall Homes, Inc.*, 576 S.E.2d 504, 506 (Va. 2003) (" the litigant who asserts the defense of res judicata has the burden of proving by a preponderance of the evidence that the claim is precluded by a prior judgment")), and (ii) res judicata is inapplicable because the two cases do not involve litigation of "the same cause of action" or any part of the same cause of action that could have been litigated. *See Flora, Flora, & Montague, Inc. v. Saunders*, 367 S.E.2d 493 (Va. 1998).

II. RESPONDENT'S INTERPRETATION OF DOMA RENDERS IT VIRTUALLY MEANINGLESS, REQUIRING ALL STATES TO CONFORM TO THE DECISIONS OF A FEW TO LEGALLY SANCTION SAME-SEX RELATIONSHIPS.

Contrary to Respondent's argument, the decision below to give full faith and credit to a child custody order arising out of a same-sex civil union based on that court's interpretation of the PKPA is *not* one of an unanimous line of cases reaching the same result, but is instead a decision of first impression with nationwide significance.[2] The fact is, this is the first case in the nation to address the question of whether, in light of the federal Defense of Marriage Act ("DOMA"), the PKPA's full faith and credit requirement mandates that a state ignore its

2. See Brief in Opposition at 2 ("Petitioner fails to cite any case with a contrary holding, and indeed the case law is unanimous that (1) the PKPA does not permit a state to invoke public policy to ignore the statute's terms; and (2) DOMA is not implicated in the absence of a marriage.").

marriage laws and state constitution expressly prohibiting recognition of same-sex relationships.[3] The two cases Respondent cited are inapposite to her position that a state cannot assert a public policy defense to the PKPA's full faith and credit requirement. *See* Brief in Opposition at 19 & n. 5. In one case, the Arkansas Supreme Court concluded that Arkansas was required to give full faith and credit to a Mississippi visitation order granting visitation rights to a putative father even though the paternity determination was inconsistent with Arkansas law. *See Perez v. Tanner*, 965 S.W.2d 90, 92 (Ark. 1998). In the other case, the Michigan Supreme Court held that the PKPA required Michigan to give full faith and credit to an Iowa decision to return custody of a baby girl to her biological parents in Iowa after a Michigan couple's attempt to adopt the child failed. *In re Clausen*, 502 N.W2d 649 (Mich. 1993).

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3. Respondent attempts to argue, in a bullet point at the conclusion of her Brief, that the Vermont orders granting her parental rights and responsibilities do not arise out of the same-sex civil union. Vermont's conclusion that Janet is a parent is a legal fiction principally resting on the fact that Janet and Lisa were in a civil union at the time Isabella was born *in Virginia*. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 970 (Vt. 2006) ("[m]any factors are present here that support a conclusion that Janet is a parent, including, ***first and foremost***, that Janet and Lisa were in a valid legal union at the time of the child's birth;'" "'the couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage'"(emphasis added)). Even clearer is the trial court's holding that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." *Miller-Jenkins v. Miller-Jenkins*, no. 454-11-03, Vt. Fam. Ct. Nov. 17, 2004 Order, at 11.

The significant difference between the issue presented here and that of all the other cases that have concluded that there is no public policy exception to the PKPA is that this case implicates the express public policy exception codified in the federal DOMA.[4] Under DOMA, no state is required to give full faith and credit to any rights or claims arising from a same-sex civil union that is treated as marriage.[5] In passing legislation and a constitutional amendment, Virginia exercised its right to declare void and unenforceable any rights or claims arising from same-sex civil unions treated as marriage.[6]

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4. It also directly implicates federalism concerns where a federal statute dictates to a state how to define marriage and family – matters of traditional state concern. *See* Petition at 15-16.

5. Respondent incredibly suggests that DOMA is inapplicable to Vermont same-sex unions. (Brief at 2). Vermont law states that "parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage . . . ." 15 V.S.A. §§ 1204(a). With respect to children born during the civil union, Vermont law states that the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse becomes the natural parent during the marriage." 15 V.S.A. §§ 1204(f). Plainly, Vermont civil unions are same-sex relationships treated as marriage.

6. As of November 2008, twenty-nine other states have similarly passed constitutional amendments preserving the traditional meaning of marriage as the union of one man and one

(Cont'd)

Confused, and contrary to the statute's express language, the Virginia Court of Appeals concluded that DOMA carved out an exception to full faith and credit for every type of right or claim arising from a same-sex civil union that is treated as marriage **except** for child custody or visitation orders.[7]

This Court should grant the Petition to resolve the important federal questions concerning the proper interpretation of the PKPA and DOMA to prevent further interstate conflicts in matters of traditional state concern. Absent intervention by this Court, additional litigation is inevitable. Because Vermont, Massachusetts, and California do not have residency requirements before a same-sex couple can enter into a civil union (Vermont), domestic partnership treated as marriage (California) or same-sex marriage (Massachusetts), the

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woman. Those states are: Alaska, Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin.

7. Respondent attempts to bolster her argument that the PKPA's full faith and credit requirement trumps the exception codified in DOMA by pointing out that the PKPA was amended in 1998 to clarify that it applied to visitation as well as custody determinations. It is not surprising that Congress did not amend DOMA at that point to clarify any confusion concerning the interplay between PKPA and DOMA because at that time, and indeed not until this case, there was no reason to suspect that courts would fail to properly apply the exception codified in DOMA. *See* Petition at 15-18 (explaining the reasons for passing, and intended scope of, DOMA).

precise federal question raised in this Petition will proliferate. *See, e.g., A.K. v. N.B.*, no. 2070086, 2008 WL 2154098, at *4-5 (Ala. Civ. App. May. 23, 2008) (relying on *Miller-Jenkins* to conclude that PKPA deprives Alabama of jurisdiction to entertain parentage action by biological mother after California declared former same-sex partner to be a parent to the biological mother's child and entered a visitation determination).

III. DECLARING A THIRD PARTY TO BE A PARENT TO PETITIONER'S BIOLOGICAL CHILD INFRINGES PETITIONER'S PARENTAL RIGHTS.

Respondent does not even attempt to argue that the Vermont decision declaring Respondent, a legal stranger, to be a parent to Petitioner's biological child is anything other than a violation of Petitioner's fundamental parental rights and as a result, Virginia should not be forced to give it full faith and credit. Instead, Respondent relies solely on her position that once the Vermont Supreme Court decided the matter – rightly or wrongly – all other forty-nine states must give the decision full faith and credit regardless of how patently unconstitutional it is. *Cf. Weidner v. W.G.N.*, 371 N.W.2d 379, 381 (Wis. Ct. App. 1985) ("A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. 'We see no reason to accord full faith and credit to a [court-approved paternity agreement] obtained in violation of equal protection.'") (citations omitted).

The Vermont order treating Respondent as a parent to Isabella failed to comport with even the minimal procedural guarantees required by the "some special weight" standard articulated by this Court in *Troxel v. Granville*, 530 U.S. 57 (2000). Vermont declared a legal stranger to be a parent over the objections of the child's fit biological parent without affording *any weight whatsoever* to the parent's preferences. Unfortunately, Vermont's decision is just one among the significant conflict that exists among the state courts regarding the fundamental rights of fit parents to prevent a court from granting parental rights in favor of a legal stranger. *See* Petition at 22-31. Confused over the PKPA's full faith and credit requirement, the Virginia courts altogether failed to even reach the parental rights argument and, more specifically, whether Virginia was required to give the unconstitutional order full faith and credit.

The incorrect PKPA interpretation also infringes upon Virginia's sovereignty given Virginia's consistent refusal to grant *visitation* rights to third parties over parental objection. *See Williams v. Williams*, 256 Va. 19, 22, 501 S.E.2d 417, 418 (1998) (relying on this Court's precedent, holding that a third party – whether a grandparent or stepparent – cannot constitutionally be awarded *visitation* over the objection of the fit, biological parent absent proof that "actual harm to the child's health or welfare" will occur without such visitation); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (denying visitation rights to former same-sex partner).

In light of the growing conflict and confusion among the states concerning parental rights of fit biological parents *vis a vis* third parties, this Court should address and resolve the conflict.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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